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Supreme Court, U.S.
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No. 03-1015

IN THE

Supreme Court of the United States

BANK AUSTRIA AG, *et al.*,

Petitioners,

v.

JOHN L. SNIADO, III,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

In the decision below, the Second Circuit held that the Foreign Trade Antitrust Improvements Act, 15 U.S.C. § 6a, does not prohibit antitrust claims by foreign purchasers where the alleged anticompetitive behavior has a direct, substantial and reasonably foreseeable effect on United States commerce. The question presented is as follows:

Does the Foreign Trade Antitrust Improvements Act preclude an antitrust action in which a plaintiff was injured abroad as a result of defendants' unlawful international conspiracy, where the anticompetitive behavior is alleged to have a direct, substantial and reasonably foreseeable effect on United States Commerce?

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Respondent John L. Sniado, III respectfully requests that the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit be denied.

INTRODUCTION

Petitioners seek review of the Second Circuit's holding that the Foreign Trade Antitrust Improvements Act ("FTAIA"), 15 U.S.C. § 6a, does not bar a claim against parties to an international conspiracy under the federal antitrust laws, for injuries sustained in international commerce. This Court has already granted certiorari in a similar case, *F. Hoffman-La Roche Ltd. v. Empagran, S.A.*, 315 F.3d 388 (D.C. Cir. 2003), *cert. granted*, __U.S.__, 124 S. Ct. 966 (2003). Respondent respectfully submits that certiorari should be denied in this case, and the case should proceed on remand, as the Second Circuit ordered. Granting certiorari and staying this case, as Petitioners request, will significantly delay its progress. This case should proceed, and Petitioners' request should be denied, because a stay will not contribute to or shape the outcome of the issue under consideration in *Empagran*.

A. Factual Background

In this action, Plaintiff-Respondent John L. Sniado, III alleges that Defendant-Petitioners and other unnamed parties engaged in a decades-long, worldwide conspiracy to fix the fees charged by Petitioners for the exchange of a number of European currencies. This conspiracy was the subject of an investigation by the European Commission's antitrust authority, and by Italian banking authorities, spanning several years, and leading to multi-million dollar fines. The Amended

Complaint sets forth allegations establishing a horizontal price-fixing conspiracy by Petitioners, which is a *per se* violation of the Sherman Act, 15 U.S.C. § 1.

Respondent submits that a grant of certiorari is not warranted, because this case will benefit from further development, and the request for a stay would serve only to delay further the proceedings in this case. Indeed, Petitioners do not ask the Court to review this case, but only to hold it in abeyance pending the Court's decision in *Empagran*. The grant of certiorari will prevent Respondent from seeking discovery, and from proceeding on issues pertaining to standing and subject matter jurisdiction that the Second Circuit expressly instructed the district court to address on remand. If certiorari is denied, the parties will have the opportunity, as ordered by the Second Circuit, to develop the record further as to the nature and scope of the conspiracy, and how it injured Plaintiff and the Class. Depending on the outcome of the additional proceedings below, the Court may then choose to review the case on this more developed record.

Thus, the petition for review here should be denied. The grant of certiorari to hold this case, as Petitioners request, will not enhance or improve the analysis undertaken in *Empagran*. While the issue concerning the interpretation of the FTAIA under review in *Empagran* is of great importance, the continued litigation of this case in the lower court to flesh out, *inter alia*, the underlying jurisdictional and related facts, will only benefit the parties and the Court in the event subsequent review by this Court should be sought.

B. Procedural History

1. Proceedings in the District Court

On November 30, 2000, Respondent Sniado filed a complaint under Section 1 of the Sherman Act, on behalf of a putative class (the "Class") comprising all persons and businesses in the United States that paid supra-competitive fees for the exchange of European currencies, as a result of Defendants' international price-fixing conspiracy. (JA 16)[1] Respondent filed an Amended Complaint in April 2001.

In their motions to dismiss, Petitioners submitted affidavits disputing the factual allegations in the Amended Complaint. Because Petitioners challenged, *inter alia*, the sufficiency of Respondent's allegations with respect to Petitioners' conduct, Respondent also filed, as part of his opposition papers, an affidavit sworn to by Bernard Persky (the "Persky Affidavit"). The Persky Affidavit annexed a series of exhibits in support of Respondent's contention that Petitioners had engaged in antitrust violations that vested the district court with subject matter jurisdiction over Respondent's claims. (JA 173-201) On November 29, 2001, the District Court granted Petitioners' Motion to Dismiss, reported at 174 F. Supp. 2d 159.

2. The *Kruman* Decision

On March 13, 2002, while appeal of this case was pending before the Second Circuit, that court issued its decision in *Kruman v. Christie's Int'l, PLC*, 284 F.3d 384

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1. Respondent cites to the Joint Appendix, submitted to the Second Circuit in this case, and available to this Court on request.

(2d Cir. 2002), *petition for cert. dismissed*, __U.S.__, 124 S. Ct. 27 (2003). The Court of Appeals concluded that plaintiffs who alleged that they paid inflated commissions to defendants, at auctions held outside the United States, had stated a claim under the antitrust laws. "[B]ecause the plaintiffs' complaint describes conduct that has the requisite 'effect' on domestic commerce under the FTAIA to be regulated by the Sherman Act, we vacate the district court's judgment granting the defendants' motion to dismiss and remand the case for further proceedings consistent with this opinion." *Id.* at 390.

The *Kruman* court examined the legislative history of the FTAIA, finding that its intent was not to limit the parties who could sue — nor was it to protect defendants from liability for the foreign effects of their anticompetitive behavior — but to protect United States exporters from liability under the antitrust laws. *See id.* at 396. Indeed, this Court has recognized the principle underlying the FTAIA is not to bar claims by plaintiffs injured in foreign commerce: "FTAIA was intended to exempt from the Sherman Act export transactions that did not injure the United States economy." *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 796-97 n.23 (1993) (citation omitted).[2]

2. The weight of authority is indeed supportive of this reading. *See Metallgesellschaft AG v. Sumitomo Corp. of America*, 325 F.3d 836, 840-41 (7th Cir. 2003) (reserving judgment on the proper reading of § 6a(2), but indicating that circuit precedent "appears to point in the direction of the approach taken by the D.C. and Second Circuits" in *Empagran* and *Kruman*). As Judge Higginbotham states in his dissent in *Den Norske Stats Oljeselskap AS v. Heeremac vof*, 241 F.3d 420 (5th Cir. 2001) (Higginbotham, J., dissenting):

> Every single congressional finding [in the legislative history of the FTAIA] relates to the importance of export

(Cont'd)

3. Proceedings in the Second Circuit

Respondent filed his notice of appeal of the district court's judgment on January 9, 2002. After briefing and oral argument, the Second Circuit vacated the district court's judgment, and remanded the case for further proceedings. The court followed its recent holding in *Kruman*, that "the 'plain meaning' of the statute precluded the construction of § 6a(2) advanced by the defendants and adopted by the district court in this case," and thus required that the effect of defendants' conduct need ónly give rise to "a claim" under the antitrust laws, not to plaintiff's specific claim. *Sniado v. Bank Austria AG*, 352 F.3d 73, 78 (2d Cir. 2003). The Second Circuit instructed the district court to consider other related issues, including antitrust standing, on remand. The Second Circuit referenced its adoption in *Kruman* of a broad reading of "conduct," in Section 6a(1) of the FTAIA, as "acts that are illegal under the Sherman Act," not just those specific acts causing the plaintiff's injury. *Id.* (quoting *Kruman*, 284 F.3d at 398-99). The court also noted that the district court had remarked on the issue of standing only in *dicta*. While acknowledging that it had discretion to consider antitrust standing on appeal, the Court of Appeals instead remanded the case expressly for determination of the standing issue in the first instance. *See id.* at 79. Last, the court granted

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(Cont'd)

> business and the need to encourage export activity by American business. . . It could not be clearer that the FTAIA serves to exempt exporting from antitrust scrutiny, not to limit the liability of participants in transnational conspiracies that affect United States commerce.

Id. at 433.

Respondent permission to file a motion for leave to replead, pursuant to Fed. R. Civ. P. 15(a).

STATUTORY PROVISIONS INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. § 1, provides in pertinent part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal.

Section 4 of the Clayton Act, 15 U.S.C. § 15(a), provides in pertinent part:

> Except as provided in subsection (b) of this section, any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

The Foreign Trade Antitrust Improvements Act, 15 U.S.C. § 6a, provides:

> Sections 1 to 7 of this title shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless—

> (1) such conduct has a direct, substantial, and reasonably foreseeable effect—
>
> (A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or
>
> (B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and
>
> (2) such effect gives rise to a claim under the provisions of sections 1 to 7 of this title, other than this section.
>
> If sections 1 to 7 of this title apply to such conduct only because of the operation of paragraph (1)(B), then sections 1 to 7 of this title shall apply to such conduct only for injury to export business in the United States.

STATEMENT

Respondent John L. Sniado, III alleges that he was injured as a result of Petitioners' conspiracy to fix fees on the exchange of European currencies. The Amended Complaint states claims under Section 1 of the Sherman Act, 15 U.S.C. § 1, and Section 4 of the Clayton Act, 15 U.S.C. § 15. It alleges that as a result of Defendants' illegal conduct, Sniado and members of the Class paid supra-competitive

exchange fees in the United States and Europe, thereby suffering injury to their business or property. The Class includes all persons and businesses in the United States that have paid supra-competitive foreign exchange fees for European currencies that now constitute the Euro, pursuant to the price-fixing conspiracy. The exact starting date of the class period is at this point unknown, beginning in the 1980s and continuing to the present.

As discussed above, the Court of Appeals for the Second Circuit vacated the dismissal of the Amended Complaint, largely on the basis of its previous holding in *Kruman v. Christie's Int'l, PLC*, 284 F.3d 384 (2d Cir. 2002), *petition for cert. dismissed*, __U.S.__, 124 S. Ct. 27 (2003), that the plain language of Subsection 6a(2) of the FTAIA requires that defendants' alleged behavior give rise to "a claim" under the antitrust laws, not *the* plaintiff's claim. *See Sniado*, 352 F.3d at 77-78; *Kruman*, 284 F.3d at 396. The Court of Appeals further instructed that the district court should address the sufficiency of the allegations under Subsection 6a(1) of the FTAIA, and the issue of whether Respondent had standing to sue under the antitrust laws. It also granted Respondent permission to file a motion seeking to replead pursuant to Fed. R. Civ. P. 15(a). *See* 352 F.3d at 78-79.

While the extent to which Respondent and members of the Class have been injured has yet to be determined through discovery, the fact that they allege sufficient antitrust injury is manifest. As stated in the Amended Complaint, the European Union and the United States are the two largest economies in the world, who together account for about half the entire world economy. The United States and European Union have the biggest bilateral trading and investment relationship in the world, with transatlantic flows of trade

and investment amounting to around $1 billion per day. Tourists from the United States traveling to European Union nations have accounted for a large portion of the tourists visiting the European Union, and a substantial portion of the travelers and enterprises adversely affected by the unlawful activities alleged herein are United States persons and businesses. Respondent has alleged that United States persons and businesses exchanging Euro-zone currencies for each other paid the supra-competitive fees set by Petitioners through their conspiracy. (JA 164-65) Respondent requested and should have had the opportunity to show this and other aspects of how the international conspiracy affected U.S. purchasers, and how it gave rise to claims by the class under the antitrust laws.

Additional proceedings in the district court on remand will lead to a fuller development of the allegations in this case, which has not yet reached the discovery phase. Indeed, the Court could deny certiorari now and consider reviewing the case when the record is more fully developed. *See Hughes Tool Co. v. TransWorld Airlines, Inc.*, 409 U.S. 363, 365 n.1 (1973) (dismissal of prior grant of certiorari, stating that this did not foreclose later consideration of the issue); *see also Brady v. Terminal R. Ass'n of St. Louis*, 302 U.S. 688, 678 (1937). Further development of the record in this case will likely help to develop more fully the issues in this case as it relates to the reach of the FTAIA, while review now will only present the FTAIA-related issues in a piecemeal, incomplete fashion.

REASONS FOR DENYING THE PETITION

I. This Case Should Proceed So That The District Court Can Determine the Sufficiency of the Pleadings, Respondent's Antitrust Standing, and the Domestic Economic Effects of the International Conspiracy.

The district court dismissed Respondent's claims pursuant to FTAIA § 6a(2), and it decided that it need not reach a determination of the sufficiency of the allegations under § 6a(1), which requires that a defendant's conduct have a "direct, substantial, and reasonably foreseeable effect" on domestic commerce. In reversing that decision, the Second Circuit remanded with a direction to the district court to follow its holding in *Kruman*, which applied a broad interpretation of "conduct." The district court had raised several questions about whether the Amended Complaint sufficiently alleged a direct, substantial and reasonably foreseeable effect on domestic commerce, as required by § 6a(1). *See* 174 F. Supp. 2d at 163-66. The parties will have the opportunity on remand to brief this issue, and the district court can issue a ruling on a fuller record.

II. Antitrust Standing Is Not A Question Warranting Supreme Court Review.

Petitioners contend that purchasers who have been injured only in foreign commerce do not have standing to pursue antitrust damages in United States courts. [Pet. Br. at 12] This argument is merely duplicative of Petitioners' FTAIA argument.

The more appropriate standing inquiry, as explained by the Second Circuit, is whether Respondent has sufficiently

alleged antitrust injury as a result of the alleged conspiracy, pursuant to Section 4 of the Clayton Act. The parties can litigate this important issue on remand. Because there is no conflict between the circuits as to the law of standing, Supreme Court review of that question is therefore not warranted here. In *Associated General Contractors, Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983), this Court explicated the factors to be considered in determining whether a person was injured within the meaning of Section 4 of the Clayton Act: (1) the causal connection between violation and harm; (2) whether the harm was intended; (3) the nature of the injury; (4) whether the plaintiff was a consumer or competitor; (5) the directness of the injury; (6) the speculative nature of the damages; (7) the potential for duplicative recovery and the existence of more direct plaintiffs; and (8) the complexity of the apportionment of damages. *See id.* at 537-44. Respondent submits that this is a classic case of horizontal price-fixing, involving a *per se* violation of the antitrust laws, for which directly affected consumers have standing to recover under the *Associated General Contractors* standing test. However, the district court can explore this question further on remand.

In support of his standing argument, Respondent alleges that he paid supracompetitive exchange fees as a result of an international price-fixing cartel. This is a classic *per se* violation of Section 1 of the Sherman Act, and Respondent thus has suffered antitrust injury. *See Reiter v. Sonotone*, 442 U.S. 330, 337-45 (1979) (holding that consumers who pay higher price for goods as a result of antitrust violations sustained injury to their property and thus had standing to bring suit). Thus Respondent is a proper party to bring suit, and there is no need to grant certiorari on this issue.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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